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Mr. Melvyn T. Shelley
County Attorney
Navajo County
Holbrook, Arizona

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ARIZONA ATTORNEY GENERAL

February 18, 1952
Opin. No. 52-41

Dear Sir:

This is in answer to your letter in which you ask our opinion on three questions. The first question reads:

"1. Can a county prisoner be given two days credit on his sentence for every one served for good behavior and work?"

Section 43-101 ACA 1939 provides:

" * * * * No act or omission commenced after twelve o'clock, noon, of the day on which this Code takes effect, is criminal or punishable, except as prescribed or authorized by this Code, or by some other law of this state, or by some ordinance, municipal, county or township regulation, passed or adopted under authority of law."

This section makes all crimes and punishment of crimes statutory. The sentence imposed for an offense must follow the statute strictly. Smith vs State, 37 Arizona 262. Any authority to give extra credit for work and for good behavior must therefore be derived from some statute and not from the common law.

The general rule on this subject is set forth in 24 Corpus Juris Secundum, page 1196.

"The punishment actually inflicted must conform strictly in character and duration to that designated in the sentence. Thus one sentenced to hard labor for the county cannot be punished by imprisonment in jail." (Emphasis supplied)

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In Howard vs State, 28 Ariz. 433, our Supreme Court held that the sentence of a prisoner could not be changed by executive officers. The Court said:

" * * * The sentence pronounced must be only that which the law annexes to the offense. In re Bonner, 151 U.S. 242 * * * . And, such sentence must be carried out as imposed, the executive officers of the state having no power either to increase or diminish its severity except as prescribed by law." (Emphasis supplied)

Unless there is some authority prescribed by law, the answer to the first question must be in the negative. An extensive review of our statutes discloses that the only authority of this nature is vested by the following sections:

"47-211. Sentence to jail may include hard labor-- Duty of sheriff to provide labor.-- When any person shall be sentenced for a misdemeanor to serve a certain number of days in any county jail, the court imposing such sentence, may order that the person so sentenced shall be kept at hard labor during the term of such sentence, or for any part thereof. When any such person shall be sentenced to hard labor therein, and any mode of labor shall be provided, the sheriff shall cause such prisoner to be kept constantly employed during every day, Sunday excepted, and when such prisoner is discharged, shall report such labor to the board of supervisors. The sheriff may, with the consent of the board, provide labor for such prisoners, if they deem it expedient and profitable to do so, either inside or outside of said jail."

"47-212. Employment on public roads or works.--The sheriffs may, with the consent of said board, from time to time cause such of the prisoners under their charge as are capable of hard labor, to be employed on any of the public streets, highways or other works, where the same will not conflict with free labor, in the county in which such prisoners shall be confined. If any person shall be convicted by a justice in a precinct having a branch or subcounty jail, and be sentenced to imprisonment for a period not to exceed thirty (30) days, such party may be employed upon the highways, or streets of the precinct in which the offense was committed."

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"47-213. County engineer to work prisoners.--The county engineer shall receive and work prisoners sentenced to hard labor as heretofore provided, and ordered to be employed by the board of supervisors, and such engineers are hereby made special constables to regulate and control such prisoners so turned over to them for that purpose."

"47-214. Deduction of fine for labor.--Whenever any prisoner sentenced to pay a fine and be committed until paid, shall be employed at hard labor pursuant to the foregoing provisions, he shall be allowed the sum of one dollar (\$1.00) additional for each day's labor, to be credited on such fine and when he shall have earned the amount of such fine he shall be discharged."

Section 47-214 permits the allowance of one dollar (\$1.00) per day for hard labor to be applied on the fine imposed by the court. There is no authority under any statute authorizing the allowance of two days credit for every day served for work or good behavior. We are therefore of the opinion this cannot be done legally.

Your second question:

"May a Judge or J. P. make a provision in their sentence and commitment providing for two days credit for every one day served based on good behavior and/or work?"

The right of the court to fix sentence is regulated by statutes and can be exercised only in accordance with the terms of those statutes. See 24 C.J.S. 1196; Smith v. State, 37 Ariz. 262; State v. McKelvey, 30 Ariz. 265.

47-211 ACA 1939 is the only statute dealing with sentencing of county prisoners to hard labor. There is no provision for extra credit on time in this or any other statute, therefore, we are of the opinion that the second question must also be answered in the negative.

The third question in your letter reads as follows:

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"Can a Judge or J. P. after sentence and commitment which makes no proviso for good behavior credit etc., thereafter make valid orders shortening the sentence or providing that credit should be given on the basis of two days for every one served?"

In State v. McKelvey, the trial court, after sentencing and the defendant having served part of the sentence, issued the following order:

"Order suspending remainder of sentence on payment of \$150 in 30 days from date on condition of good behavior and continuance in employment of Kay Copper Company and support of family".

The county attorney filed a petition to vacate the order on the ground that the court was without jurisdiction to make it.

The Supreme Court of Arizona in vacating the order and after quoting applicable statutes, said:

" * * * From the foregoing quotation it appears clearly that the only case in which the statute provides for the execution of any sentence being suspended is where the judgment is to pay a fine, and that the defendant be imprisoned until it be paid, and this must be done at the time the sentence is imposed. In all other classes of sentences the power of the Court under the statute is limited to suspending the imposition of the sentence and not the execution thereof." (Emphasis supplied)

See also Smith v. State, 37 Ariz. 262.

From the foregoing it is clear that all provisions to a sentence a court may wish to make must be made at the time of sentencing and that the court is without jurisdiction to later add to or delete from the original sentence imposed.

We are enclosing copies of two prior opinions given by this office which may be helpful on this and closely related subjects.

Sincerely,

FRED O. WILSON
Attorney General

ALFRED C. MARQUEZ
Assistant Attorney General

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